RECORD AND BRIEFS

No. 10-1270

Supreme Court, U.S.
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In the
Supreme Court of the United States

GARRETT DOTCH,
Petitioner,

v.

STATE OF ALABAMA,
Respondent.

On Petition for a Writ of Certiorari to
the Alabama Court of Criminal Appeals

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Luther Strange
Alabama Attorney General

John C. Neiman, Jr.
Alabama Solicitor General

Henry M. Johnson
Assistant Alabama Attorney General
*Counsel of Record

Office of the Attorney General
501 Washington Avenue
Montgomery, Alabama 36130
(334) 242-7300
hjohnson@ago.state.al.us

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CAPITAL CASE

QUESTION PRESENTED FOR REVIEW
(Rephrased)

1. Should this Court grant certiorari to review Garrett Dotch's claim that *Ring v. Arizona* mandates that a jury, as opposed to a trial court, must determine, unanimously and beyond a reasonable doubt, the existence of each and every statutory aggravating circumstance on which a death sentence is based where that claim was not raised or addressed in the lower court and where any decision with regard to that question will not affect the outcome in this case?

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STATEMENT OF THE CASE

A. The Proceedings Below

On March 9, 2007, Garrett Dotch was indicted by the Grand Jury of Mobile County, Alabama on two counts of capital murder. Count One of the indictment charged Dotch with the capital offense of the murder of Timarla Taldon by or through the use of a deadly weapon while Ms. Taldon was inside a vehicle, in violation of Ala. Code § 13A-5-40(a)(17). (C.R. 26.)[1] Count Two of the indictment charged Dotch with the capital offense of the murder of Ms. Taldon by shooting her when she was or had been subpoenaed to testify, or had testified, in a criminal trial or proceeding and the murder stemmed from, was caused by, or was related to her role as a witness, in violation of Ala. Code § 13A-5-40(a)(14). (C.R. 26.) The Honorable Roderick P. Stout presided over Dotch's trial.

On May 13, 2008, a Mobile County jury found Dotch guilty of the capital murder of Ms. Taldon under Count One of the indictment. (C.R. 27; R. 1428.) The jury found Dotch not guilty of capital murder under the second count of the indictment. (R. 1428.) Following the presentation of evidence, closing arguments, and instructions from the trial court, the jury, on May 14, 2008, recommended by a vote of ten to two that Dotch be sentenced to death. (C.R. 28; R. 1627.)

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[1] References to the record will appear in this brief as follows: references to the clerk's record on direct appeal and references to the reporter's transcript on direct appeal will appear, respectively, as "C.R.__." and "R.__."

Critically, for present purposes, the trial court instructed the jurors that they could consider only the following two statutory aggravating circumstances in determining whether to recommend a sentence of death or life without parole for Dotch: (1) the capital offense was committed by a person under sentence of imprisonment, pursuant to Ala. Code § 13A-5-49(1)[2]; and, (2) the defendant was previously convicted of another capital offense or a felony involving the use or threat of violence to the person, pursuant to Ala. Code § 13A-5-49(2). (R. 1607-1610.) The trial court repeatedly informed the jurors that the State had the burden of proving the existence of the aggravating circumstances and that they were required to unanimously find the existence of at least one aggravating circumstance beyond a reasonable doubt before they could begin the process of weighing the aggravating circumstances against the mitigating that would lead them to determine which sentence to recommend for Dotch. (R. 1608-1610, 1612.)

The trial court instructed the jurors that they could consider the following statutory mitigating circumstances: (1) the capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance, pursuant to Ala. Code § 13A-5-51(2); (2) the capacity of the

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[2] Ala. Code § 13A-5-39(7) defines the term, "under sentence of imprisonment," as follows: "As used in Section 13A-5-49(1), the term means while serving a term of imprisonment, while under a suspended sentence, while on probation or parole, or while on work release, furlough, escape, or any other type of release or freedom while or after serving a term of imprisonment, other than unconditional release and freedom after expiration of the term of sentence."

defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired, pursuant to Ala. Code § 13A-5-51(6); and, (3) the age of the defendant at the time of the crime, pursuant to Ala. Code § 13A-5-51(7). (R. 1610-1611.) The trial court further instructed the jurors that they could consider as a mitigating circumstance any aspect of Dotch's character or record and any of the circumstances of the offense that Dotch offered as a basis for a sentence of life without parole instead of death. (R. 1611.)

The trial court conducted its own sentencing hearing in this matter on June 26, 2008, during which the court heard the testimony of several witnesses and the arguments of counsel. On July 23, 2008, the court followed the recommendation of the jury and sentenced Dotch to death. (C.R. 554-575.)

In its order sentencing Dotch to death, the trial court made specific findings of fact regarding the aggravating and mitigating circumstances. The court found that the State satisfied its burden of proving the existence of the aforementioned two aggravating circumstances beyond a reasonable doubt. (C.R. 560-561.) In addition, the court noted that Dotch "does not challenge" the existence of either of those aggravating circumstances. (C.R. 560-561.)

The trial court did not find the existence of any statutory mitigating circumstances. (C.R. 563-527.) But, the court stated that it considered all of the relevant evidence that was presented by Dotch during the penalty and sentencing phases of his trial, and the court found the existence of the following

non-statutory mitigating circumstances: (1) Dotch's lack of a stable and nurturing environment; (2) Dotch's voluntary, long-term use of illegal drugs; (3) Dotch's history of mental health problems; (4) Dotch's remorse for his crime and his ability to love and care for others; and, (5) the pleas for mercy that were made by Dotch, his family members, and his counsel. (C.R. 568-572.) The trial court concluded that the aggravating circumstances outweighed the mitigating and accordingly sentenced Dotch to death. (C.R. 574-575.)

On April 2, 2010, the Alabama Court of Criminal Appeals affirmed Dotch's capital murder conviction and death sentence. *Dotch v. State*, CR-07-1913, 2010 WL 1260162 (Ala. Crim. App. Apr. 2, 2010). On June 11, 2010, that court overruled his application for rehearing. *Id.* The Supreme Court of Alabama denied his petition for writ of certiorari on January 14, 2011. See Pet. App. C.

B. Statement of the Facts

Garrett Dotch and Timarla Taldon met in middle school and began dating while they were in high school. (R. 964, 975.) After Timarla graduated in 2001, she and Dotch lived together in an apartment. (R. 975.) Their relationship ended the following year, and she moved into an apartment of her own. (R. 966-967.)

Lieutenant Stephanie Smith of the Mobile Police Department testified that she responded to a complaint that Timarla's apartment had been burglarized on September 1, 2003. (R. 815-816.) According to Lieutenant Smith, the door of Timarla's residence "had been kicked in and it was splintered

where it had been kicked." (R. 817.) She testified that Timarla had been injured during the burglary, and she specifically recalled that there were bruises on her face and blood inside one of her eyes. (R. 817.) Dotch was arrested in connection with that crime, and he subsequently pleaded guilty to the charges of first-degree burglary and third-degree assault. (R. 818-819.) Although he was sentenced to fifteen years on each of those convictions, Dotch's sentence was split to time-served, and he was placed on probation for five years. (C.R. 641.)

Officer Michael James of the Mobile Police Department testified that he responded to a domestic violence complaint at Timarla's apartment on May 15, 2005. (R. 833-834.) Based on Timarla's complaint, an arrest warrant was issued for Dotch on the charge of domestic violence in the third degree. (R. 834.) Dotch pleaded guilty to that offense, and he was sentenced to 180 days imprisonment. (C.R. 646; R. 836, 892-893.) Officer Joseph Crum of the Alabama Board of Pardons and Paroles testified that he filed a delinquency report alleging that Dotch had violated the terms and conditions of his probation based on his domestic violence conviction, and he testified that Dotch's probation accordingly was revoked for 180 days to run concurrent with his sentence for that offense. (R. 892-893.) Officer Crum further testified that he instructed Dotch to have no more contact with Timarla. (R. 896) Dotch ignored that instruction.

Sarah T. Dinkins, Timarla's mother, testified that she spent the first week of July 2006 at her daughter's apartment. (R. 962, 967-968.) Mrs. Dinkins stated that Dotch called Timarla numerous

times during that week and that either she or Timarla spoke with him when he called. (R. 968.) She testified that she repeatedly told him that Timarla did not want any contact with him and implored him to leave her daughter alone. (R. 968.) Mrs. Dinkins returned to her home on July 8, 2006, but two of Timarla's cousins remained with her at her apartment. (R. 949, 968.)

Jiquisa Thomas, Timarla's cousin, testified that she stayed with Timarla at her apartment from July 1, 2006 until the day that Dotch murdered Timarla. (R. 948-949.) According to Jiquisa, someone began banging on the door of Timarla's apartment at approximately 2:00 a.m. or 3:00 a.m. on July 9, 2006. (R. 950-951.) Jiquisa saw Dotch standing outside the apartment, and she informed Timarla that he was the person banging on the door. (R. 951-952.) When Timarla went to the door, Dotch tried to force his way into her apartment, but she was successful in preventing him from doing so. (R. 952.) Dotch left, but he returned later that morning. (R. 953.) On this occasion, Dotch told Timarla that he had placed money for her under her car and asked her to come outside. (R. 953.) Timarla refused his request, and she told him that he needed to leave and that she was calling the police. (R. 953.) He left before the police arrived. (R. 953-954.)

Later that day, Dotch called Timarla, and, without his knowledge, she put him on a three-way call with her mother. (R. 971.) Mrs. Dinkins testified that she heard Dotch curse Timarla and tell her that he was going to kill her. (R. 972.) Upon hearing that threat, Mrs. Dinkins asked him why he would want to kill Timarla and again begged him to

leave her daughter alone. (R. 972.) Dotch then hung up the phone. (R. 972.) But, Dotch continued to call Timarla that day. (R. 973.) In fact, Agent Ben Kinsey of the Federal Bureau of Investigation testified that Dotch placed approximately 88 phone calls to Timarla in the two weeks preceding her murder, including 51 calls to her apartment on July 9, 2006. (R. 925-928.)

On the afternoon of July 10, 2006, shortly after finishing her shift at a Subway sandwich shop, Timarla took off her apron, collected her belongings, and walked alone to her car. (R. 680-681, 683.) According to the testimony of Willie Rodgers, her close friend and co-worker, Timarla parked her vehicle behind the sandwich shop on that day, just as she normally did. (R. 681.)

Timarla was approached by a black male, in his early to mid-twenties, wearing a white tee-shirt and long, denim shorts, and carrying a gun, as she was walking toward her car. (R. 694, 707-708, 722.) After Timarla got in her vehicle, the man shot her multiple times with a .45 caliber pistol. (R. 722, 724, 745-749.) He then fled the scene on foot. (R. 693, 708-709, 735.)

Mr. Rodgers testified that a woman who was employed by the McDonald's fast food restaurant that was adjacent to the Subway sandwich shop ran into the shop to inform him and his co-workers that something had happened. (R. 683.) Mr. Rodgers then hurried outside to check on Timarla and found her dead in her vehicle. (R. 683.) He and one of his co-workers carried Timarla inside the store and laid her on the floor. (R. 684.) Emergency personnel

arrived soon thereafter and declared that she was dead. (R. 688.)

Multiple eyewitnesses identified Dotch as the man who shot Timarla. (R. 695, 702, 708, 717-718, 723, 726-727.) In addition, fresh latent palm prints, positively matching Dotch, were found on Timarla's car door. (R. 786-787, 790-793, 802-803.) Dr. Karen Kelly, a forensic pathologist who is employed as a state medical examiner by the Department of Forensic Sciences, testified that she performed the autopsy on Timarla. (R. 983, 990.) Dr. Kelly opined that Timarla's official cause of death was multiple gunshot wounds. (R. 1002.)

REASONS FOR DENYING THE PETITION

I. Dotch's Death Sentence Does Not Implicate *Ring v. Arizona* Because The Two Aggravating Circumstances That Were Found To Exist In His Case Relate To His Prior First-Degree Burglary Conviction.

Dotch contends that this Court should grant certiorari to resolve a split among the state courts regarding the role of the jury in determining the existence of statutory aggravating circumstances in death penalty cases. Pet. at 6. Specifically, Dotch asks this Court to determine whether *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428 (2002), mandates that a jury must find, unanimously and beyond a reasonable doubt, the existence of every statutory aggravating circumstance on which a death sentence is based. Pet. at 6-9. Dotch's assertion that there is a split here is, in the very least, exaggerated. Although Dotch claims that the Supreme Courts of Indiana and Nebraska have definitively weighed in

on this issue, he cites only isolated language from those courts, not any holdings that reveal that they have thoroughly considered the matter. Even if there is a split as deep and as clear as Dotch claims, this Court should still deny certiorari for at least two reasons: (1) Dotch did not raise this claim in the lower court; and, (2) his case is a poor vehicle for deciding this claim because, even if there is a split here, the resolution of the split will not alter the outcome in his case.

A. Certiorari Should Be Denied Because Dotch's Claim Was Not Properly Raised In The Lower Court.

Most critically, this Court should deny cert on this claim because Dotch did not clearly raise and properly present it to the Alabama Court of Criminal Appeals, and his failure to do so is a jurisdictional bar. Dotch simply argued to the lower court that his death sentence generally was contrary to *Ring*, emphasizing that *Ring* requires the jury to find that the aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt, *not* that the jury is required to find the existence of each and every aggravating circumstance unanimously and beyond a reasonable doubt. Resp. App. 1a-3a. Notably, Dotch did not mention, much less address, the State's response to his *Ring*-based claims in his reply brief.

In denying relief on his *Ring*-based claims, the Alabama Court of Criminal Appeals reasoned as follows:

> Dotch argues that his sentence of death is due to be reversed pursuant to the holding in

Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L.Ed.2d 556 (2002). He alleges that Alabama's capital-sentencing scheme is functionally identical to the scheme held to be unconstitutional in *Ring*, because the jury's verdict is not binding on the court. He further argues that Alabama's capital-sentencing scheme violates *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000), by violating the requirement that any fact that increases the maximum penalty must be proved beyond a reasonable doubt.

In *Apprendi*, the United States Supreme Court held that a fact that increased a defendant's sentence beyond the statutory limits, other than the fact of a prior conviction, had to be found by a jury beyond a reasonable doubt. The Court then applied this holding to cases involving the death penalty in *Ring*, supra.

However, courts in Alabama have determined that Alabama's sentencing scheme is not unconstitutional under *Ring*, or *Apprendi* because the weighing process undertaken to arrive at a capital sentence is not a finding of fact or an element of the offense; therefore, a jury is not constitutionally required to weigh the aggravating and mitigating circumstances. *See Ex parte Waldrop*, 859 So. 2d 1181 (Ala. 2002); *Beckworth v. State*, 946 So. 2d 490, 515 (Ala. Crim. App. 2005), cert. denied, 549 U.S. 1120, 127 S. Ct. 936, 166 L.Ed.2d 717

> (2007). Therefore this issue has already been determined adversely to Dotch's arguments.

Dotch, 2010 WL 1260162, at *59-60. Thus, the lower court understood Dotch to be arguing that Alabama's capital sentencing statute is unconstitutional, in light of *Ring*, because the jury's recommendation is not binding on the trial court and because the jury and the trial court are not required to find that the aggravating circumstances outweigh the mitigating beyond a reasonable doubt. *Id.*

In the face of the lower court's decision indicating that it understood him to have raised only those claims, Dotch did not argue in his rehearing application, as he was entitled to under Alabama law, that the Court had misperceived his *Ring*-based argument. *See* Ala. R. App. P. 40(a)(2)(B) ("The application for rehearing must state with particularity the points of law or the facts the applicant believes the court overlooked or misapprehended."). Instead, Dotch just re-iterated his claims alleging that Alabama's capital sentencing statute is unconstitutional because the jury's recommendation is not binding on the trial court and because the jury and the trial court are not required to find that the aggravating circumstances outweigh the mitigating beyond a reasonable doubt. Resp. App. 4a-5a.

Likewise, in the petition for writ of certiorari that he filed in the Supreme Court of Alabama, Dotch raised those exact same *Ring*-based claims and made no mention of the claim that he now presents to this Court. Resp. App. 6a-7a.

Thus, the Alabama Court of Criminal Appeals did not address the claim that Dotch presents to this Court – whether the jury in a death penalty case is required to find the existence of each and every aggravating circumstance unanimously and beyond a reasonable doubt – because he failed to raise it in that court. This Court has long held that it will not consider questions that were not properly presented to or ruled on by the lower courts except in extraordinary circumstances. *See, e.g., Taylor v. Freeland & Kronz*, 503 U.S. 638, 645-646, 112 S. Ct. 1644, 1649 (1992). This case presents no reason to deviate from that rule. Because Dotch's claim was not preserved below, it should not be considered by this Court.

B. Certiorari Should Be Denied Because Resolving The Purported Split Will Not Affect The Outcome In Dotch's Case.

Dotch asks this Court to grant certiorari to determine whether, in light of *Ring*, a jury must determine, unanimously and beyond a reasonable doubt, the existence of every statutory aggravating circumstance on which a death sentence is based. Pet. at 6-9. Even assuming, *arguendo*, that there is a split among the state courts with regard to that question, this Court should deny cert because the resolution of the split will not affect the outcome in Dotch's case.

As explained below, that is so for two reasons. First, even if *Apprendi* and *Ring* required a jury determination of all aggravating circumstances beyond a reasonable doubt, the aggravating circumstances at issue here – both of which pertain to the fact of a prior conviction – fall within the

Almendarez-Torres exception to the *Apprendi/Ring* line of cases. Second and alternatively, even if this Court were to decide that *Apprendi* and *Ring* required submission of this fact to the jury, that holding would not affect the outcome in Dotch's case because any purported error on this front would have been harmless beyond a reasonable doubt.

1. *Apprendi* and *Ring* do not even arguably apply here because the fact at issue falls within the *Almendarez-Torres* exception.

As an initial matter, the purported split is irrelevant to this case because the aggravating circumstances at issue here fall within the ambit of this Court's decision in *Almendarez-Torres*. Under Alabama law, a defendant who has been convicted of a capital offense is not eligible for the death penalty unless and until at least one of the statutory aggravating circumstances that are enumerated in Ala. Code § 13A-5-49 is found to exist beyond a reasonable doubt. *Ex parte Waldrop*, 859 So. 2d 1181, 1187 (Ala. 2002) (citing Ala. Code § 13A-5-45(f)). Here, the State introduced two statutory aggravating circumstances, both of which pertained to Dotch's prior first-degree burglary conviction.

In *Almendarez-Torres v. United States*, 523 U.S. 224, 243-245, 118 S. Ct. 1219, 1230-1231 (1998), this Court held that prior convictions do not have to be proven to a jury beyond a reasonable doubt, even where the finding of a prior conviction increases a defendant's sentence beyond that authorized by the jury's verdict. In reaching that result, this Court reasoned, in pertinent part, as follows:

> First, the sentencing factor at issue here – recidivism – is a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence. Consistent with this tradition, the Court said long ago that a State need *not* allege a defendant's prior conviction in the indictment or information which alleges the elements of an underlying crime, even though the conviction was necessary to bring the case within the statute. That conclusion follow[s] ... from *the distinct nature of the issue*, and the fact that recidivism does not relate to the commission of the offense, *but goes to the punishment only*, and therefore ... may be subsequently decided. The Court has not deviated from this view.

Id. at 243-244, 118 S. Ct at 1230-1231 (emphasis in original) (internal quotation marks and citations omitted). Thus, this Court emphasized that questions related to recidivism traditionally have been decided by the sentencing court rather than the jury in holding that a trial court can elevate a defendant's sentence based solely on its finding that he has a prior conviction. *Id.*

This Court did not deviate from that rule in its decision in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000). In *Apprendi*, this Court held that, "*[o]ther than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490, 120 S. Ct. at 2362-2363 (emphasis added). In so ruling, this Court stated that it was not overruling

Almendarez-Torres. *Id.* at 488, 120 S. Ct at 2362. Indeed, this Court again held that a trial court has the authority to increase a defendant's sentence above that which is authorized by the jury's verdict based on a finding that the defendant has a prior conviction, reasoning:

> Both the certainty that procedural safeguards attached to any "fact" of prior conviction, and the reality that Almendarez-Torres did not challenge the accuracy of that "fact" in his case, mitigated the due process and Sixth Amendment concerns otherwise implicated in allowing a judge to determine a "fact" increasing punishment beyond the maximum of the statutory range.

Id. According to this Court, that is all the more true where the defendant has "admitted" that he has a prior conviction. *Id.*

In *Ring*, 536 U.S. at 609, 122 S. Ct. at 2443, this Court extended its holding in *Apprendi* to capital sentencing. Specifically, this Court held that Arizona's death penalty statute violated the Sixth Amendment right to a jury trial because it allowed "a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." *Id.* This Court concluded that, "[i]f a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." *Id.* at 602, 122 S. Ct. at 2439. But, this Court did not eliminate the prior-conviction exception to that rule that was enunciated in *Almendarez-Torres*.

Critically, this Court stated the following with regard to the petitioner's claim:

> Ring's claim is tightly delineated: He contends only that the Sixth Amendment required jury findings on the aggravating circumstances asserted against him. No aggravating circumstance related to past convictions in his case; Ring therefore does not challenge *Almendarez–Torres v. United States*, 523 U.S. 224, 118 S. Ct. 1219, 140 L.Ed.2d 350 (1998), which held that the fact of prior conviction may be found by the judge even if it increases the statutory maximum sentence.

Id. at 597, n.4, 122 S. Ct. at 2437, n.4. Thus, *Ring* has no application to cases in which the only aggravating circumstances that led to the imposition of a death sentence are based on the defendant's prior conviction.

The question here, therefore, is whether Dotch's "maximum penalty" was "increase[d]" by some judicial finding of a fact "other than [a] prior conviction." *Ring*, 536 U.S. at 600, 122 S. Ct. at 2439 ("[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.") (quoting *Jones v. United States*, 526 U.S. 227, 243, n.6, 119 S. Ct. 1215, 1224, n.6 (1999)). Plainly, it was not.

The State argued that the following two statutory aggravating circumstances existed at the penalty phase of Dotch's trial: (1) the capital offense was committed by a person under sentence of imprisonment, pursuant to Ala. Code § 13A-5-49(1); and, (2) the defendant was previously convicted of another capital offense or a felony involving the use or threat of violence to the person, pursuant to Ala. Code § 13A-5-49(2). (R. 1607-1610.) The aggravating circumstances were based on his September 27, 2004 guilty plea to the charge of first-degree burglary, for which he was placed on probation for five years. (C.R. 641.)

To satisfy its burden of proving the existence of those two aggravating circumstances, the State introducing a certified copy of the docket sheet pertaining to Dotch's first-degree burglary conviction. (R. 1465, 1492.) The docket sheet, which was admitted as State's Exhibit 50-B, contained the aforementioned information, and the State included the indictment charging him with that offense in that exhibit. (C.R. 638-652.) The indictment stated:

> Garrett Dotch ... did, on or about **September 1, 2003**, knowingly and unlawfully enter or remain unlawfully in the dwelling of **Timarla Taldon**, and while effecting entry or while in the dwelling or in immediate flight therefrom, the said **Garret Dotch** did cause physical injury to **Timarla Taldon**, to wit: **by striking her about the face with his fist**, in violation of § 13A-7-5 of the Code of Alabama.

(C.R. 652.) (emphasis in original).

Not surprisingly, the trial court, in its sentencing order, found that the State satisfied its burden of proving the existence of those aggravating circumstances beyond a reasonable doubt. (C.R. 560-561.) Significantly, the trial court further found that Dotch "does not challenge the existence" of either of the aggravating circumstances. (C.R. 560-561.) Thus, his prior first-degree burglary conviction, standing alone, rendered him death-eligible. And, for that reason, Dotch's death sentence does not implicate *Ring*.

Moreover, what Dotch seeks is the overruling of *Almendarez-Torres*, but he never mentions, much less addresses, that decision in his cert petition. For at least a decade, this Court has been bombarded with requests to scrap *Almendarez-Torres*, and this Court consistently has rejected those requests. *See, e.g.*, *James v. United States*, 550 U.S. 192, 214, n.8, 127 S. Ct. 1586, 1600, n.8 (2007) ("To the extent that James contends that the simple fact of his prior conviction was required to be found by a jury, his position is baseless. James admitted the fact of his prior conviction in his guilty plea, and in any case, we have held that prior convictions need not be treated as an element of the offense for Sixth Amendment purposes."). Indeed, Justice Stevens acknowledged that his view that *Almendarez-Torres* was decided incorrectly does not constitute a "sufficient reason" for re-visiting it:

> The denial of a jury trial on the narrow issues of fact concerning a defendant's prior conviction history, unlike the denial of a jury trial on other issues of fact that give rise to mandatory minimum sentences, will seldom

> create any significant risk of prejudice to the accused. Accordingly, there is no special justification for overruling *Almendarez-Torres*. Moreover, countless judges in countless cases have relied on *Almendarez-Torres* in making sentencing determinations. The doctrine of *stare decisis* provides a sufficient basis for the denial of certiorari in these cases.

Rangel-Reyes v. United States, 547 U.S. 1200, 126 S. Ct. 2873 (2006) (statement of Justice Stevens respecting the denial of the petitions for writ of certiorari). This Court should, therefore, reject Dotch's implicit request that it revisit its own well-settled precedent and deny his cert petition. *See also United States v. Pineda-Arrellano*, 492 F.3d 624, 625 (5th Cir. 2007) ("Because the Supreme Court treats *Almendarez-Torres* as binding precedent, Pineda's argument is fully foreclosed from further debate.").

Apart from his disagreement with *Almendarez-Torres*, Dotch attempts to sow confusion in his cert petition by alleging that the trial court was required to hear "witness testimony" and consider additional facts to determine "whether his three-year sentence from March 2002 had fully run by the time of Ms. Taldon's death in July 2006, or whether the running of the sentence had been tolled." Pet. at 4, n.2. Quite simply, Dotch is mistaken.

Before the penalty phase of Dotch's trial began, the prosecutors advised the trial court that they planned to introduce a certified copy of a docket sheet reflecting that Dotch was convicted of the possession of a controlled substance in 2002 and was placed on three years of probation for that offense as

additional evidence to prove the existence of the aggravating circumstance that he was under a sentence of imprisonment on July 10, 2006, the day that he murdered Timarla Taldon. (R. 1431-1433.) After the trial court asked them whether Dotch's sentence for that offense had expired before the murder of Timarla, the prosecutors informed the court that they would call his probation officer to testify that his sentence had been tolled by his subsequent offenses in 2003 and, therefore, was still in place at the time of her death. (R. 1433-1434.) But, the prosecutors apparently reversed course because they did not call his probation officer or even once mention Dotch's 2002 felony drug conviction during the State's penalty phase case-in-chief.

During the penalty phase charge conference, the trial court suggested that Dotch could argue that the statutory mitigating circumstance that the defendant has no significant history of prior criminal activity, pursuant to Ala. Code § 13A-5-51(1), existed in his case. (R. 1469.) Upon hearing that statement, the prosecutors informed the court that they intended to introduce a certified copy of the docket sheet reflecting Dotch's 2002 felony drug conviction for the limited purpose of rebutting that statutory mitigating circumstance. (R. 1477-1479.) His counsel then replied that they were not going to rely on that statutory mitigating circumstance, and based on that information, the trial court expressly forbade the prosecutors from making any reference to his 2002 drug conviction. (R. 1480, 1488.) And, the record reveals that the jurors never were informed about that conviction.

In short, the trial court's finding that the State satisfied its burden of proving the existence of Dotch's prior first-degree burglary conviction beyond a reasonable doubt, by itself, rendered him death-eligible. In fact, Dotch, just like the petitioner in *Almendarez-Torres*, did not contest the existence of that prior conviction. For that reason, Dotch's death sentence does not implicate *Ring*, and this Court accordingly should deny cert because any answer to the question of whether a jury must determine, unanimously and beyond a reasonable doubt, the existence of each and every statutory aggravating circumstance on which a death sentence is based will not affect the outcome of his case.

2. Any asserted error would be harmless in Dotch's case.

Moreover, even if this case somehow fell outside the ambit of *Almendarez-Torres*, this Court's resolution of the question presented would not affect the outcome in Dotch's case because any asserted *Ring* error here would have been harmless beyond a reasonable doubt. This Court has found that the failure to treat a fact as an element of the crime can be deemed harmless if "the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error." *Neder v. United States*, 527 U.S. 1, 17, 119 S. Ct. 1827, 1837 (1999). That was the case here, for the trial court specifically found that Dotch did not contest the existence of the conviction at issue. Accordingly, even if there had been *Ring* error here, it would have been harmless, and granting certiorari on this question would not affect the outcome in Dotch's case.

Conclusion

For the foregoing reasons, this Court should deny Garrett Dotch's petition for writ of certiorari.

Respectfully submitted,

Luther Strange
Alabama Attorney General

John C. Neiman, Jr.
Alabama Solicitor General

Henry M. Johnson
Assistant Attorney General
*Counsel of Record

Office of the Atty. General
501 Washington Avenue
Montgomery, AL 36130
(334) 242-7300
hjohnson@ago.state.al.us

May 18, 2011

APPENDIX

Brief of the Appellant to the Court of Criminal Appeals – Issue XVII 1a

Application for Rehearing of Appellant Garrett Dotch and Brief in Support of Application for Rehearing – Issue XVII 4a

Petition for a Writ of Certiorari – Section C 6a

IN THE COURT OF
CRIMINAL APPEALS OF ALABAMA

GARRETT DOTCH, Appellant,	)	
v.	)	No. CR-07-1913
STATE OF ALABAMA, Appellee.	)	

BRIEF OF THE APPELLANT
(June 9, 2009)

XVII. *RING V. ARIZONA* COMPELS REVERSAL OF MR. DOTCH'S DEATH SENTCE.

In *Ring v. Arizona*, 536 U.S. 584, 609 (2002), the Supreme Court held that facts necessary to sentence a defendant to death must be found by the jury beyond a reasonable doubt. The Court rejected Arizona's death-penalty scheme because it allowed the judge, without a jury, to find the aggravating factors that permitted death. *See id.* at 602-03 ("If a State makes an increase in a defendant's authorized punishment contingent on the finding of fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt.").

Alabama's capital sentencing scheme is functionally identical to the scheme struck down in *Ring* and fails constitutional muster for the same reasons. After the sentencing hearing, the jury returns an advisory verdict that "is not binding on the court." Ala. Code § 13A-5-47(e) (1975). The judge, without knowing which aggravating and mitigating factors the jury found to exist, must independently determine whether any aggravating circumstances outweigh any mitigating

circumstances. *Id.* Thus, it is the trial judge, not the jury, who determines whether the defendant receives a death sentence. *See Ex parte Hays*, 518 So. 2d 768, 775 (Ala. 1986) ("[T]he judge, and not the jury, is the final sentencing authority."); *Bush v. State*, 431 So. 2d 555, 559 (Ala. Crim. App. 1982) (the trial court "is in no way bound by the jury's recommendation concerning sentence").

This system is functionally identical to the one struck down in *Ring*. At the critical stage, the determination of whether aggravating factors outweigh mitigating factors and whether death is warranted is made not by the jury, but by a judge. A judge sitting alone cannot make this determination, which exposes the defendant to a greater punishment – death. *See Ex parte Waldrop*, 859 So. 2d 1181, 1197 (Ala. 2002) (Lyons, J., concurring in part and dissenting in part) ("'Facts that expose the defendant to a punishment greater than that otherwise legally prescribed'" constitute a separate offense and must be found by a jury (quoting *Harris v. Unites States*, 536 U.S. 545, 576 (2002) (Thomas, J., dissenting))). "[T]he Supreme Court has consistently returned to the bedrock principle that criminal sentences must be 'authorized' by 'the jury verdict alone.'" *United States v. Faust*, 456 F.3d 1342, 1350 (11th Cir. 2006) (Barkett, J., concurring) (citations omitted).

Alabama's capital sentencing scheme also violates the requirement that any fact that increases the maximum penalty must be proved beyond a reasonable doubt. *See Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). Because Alabama does not permit juries to indicate or specify which, if any,

aggravating circumstances were found, *see e.g.*, *Ex parte McGriff*, 908 So. 2d 1024, 1039 (Ala. 2004) (proposed verdict form), the record precludes review of whether there was a reliable basis for imposition of a death sentence. Moreover, neither the judge nor the jury is required to find that the aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt, as required by *Apprendi*. *Waldrop*, 859 So. 2d at 1188-89 (aggravating factors need not outweigh mitigating factors beyond a reasonable doubt). Alabama's capital sentencing scheme violates Mr. Dotch's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and Alabama law.

IN THE COURT OF CRIMINAL APPEALS OF ALABAMA

GARRETT DOTCH, Appellant,	)	
v.	)	No. CR-07-1913
STATE OF ALABAMA, Appellee.	)	

APPLICATION FOR REHEARING OF APPELLANT GARRETT DOTCH AND BRIEF IN SUPPORT OF APPLICATION FOR REHEARING

(April 30, 2010)

XVII. THE COURT ERRED IN FAILING TO FIND THAT *RING V. ARIZONA* COMPELS REVERSAL OF MR. DOTCH'S DEATH SENTENCE.

This Court erred by rejecting Mr. Dotch's argument that *Ring v. Arizona*, 536 U.S. 584, 609 (2002), compels the reversal of his death sentence. Opinion at *59. As the Court recognized, the Supreme Court in *Ring* held that the facts necessary to sentence a defendant to death must be found by the jury beyond a reasonable doubt. The Court rejected Arizona's death-penalty scheme because it allowed the judge, without a jury, to find the aggravating factors that permitted death. *See id.* at 602-03 ("If a State makes an increase in a defendant's authorized punishment contingent on the finding of fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt."). As Mr. Dotch argued, Alabama's capital sentencing scheme is functionally

identical to the scheme struck down in *Ring* and is unconstitutional for the same reasons.

Alabama's capital sentencing scheme also violates the requirement that any fact that increases the maximum penalty must be proved beyond a reasonable doubt. *See Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). Neither the judge nor the jury is required to find that the aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt, as required by *Apprendi*. Therefore, this Court should reconsider Mr. Dotch's argument that Alabama's capital sentencing scheme violates his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and Alabama law.

Mr. Dotch incorporates his arguments on pages 113-16 of his opening brief.

IN THE SUPREME COURT OF ALABAMA

GARRETT DOTCH, Petitioner,	)	
v.	)	No. 1091264
STATE OF ALABAMA, Respondent.	)	

PETITION FOR A WRIT OF CERTIORARI

(August 13, 2010)

C. *Ring v. Arizona* Compels Reversal Of Mr. Dotch's Death Sentence

The reversal of Mr. Dotch's death sentence is compelled by *Ring v. Arizona*, 536 U.S. 584 (2002), where the Supreme Court held that the facts necessary to sentence a defendant to death must be found by the jury beyond a reasonable doubt. The Court in *Ring* rejected Arizona's death-penalty scheme because it allowed the judge, without a jury, to find the aggravating factors that permitted death. *See id.* at 602-03 ("If a State makes an increase in a defendant's authorized punishment contingent on the finding of fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt."). As Mr. Dotch has argued, Alabama's capital sentencing scheme is functionally identical to the scheme struck down in *Ring* and is unconstitutional for the same reasons.

Due to the conflict of Alabama's capital sentencing scheme with U.S. Supreme Court precedent, this Court should grant certiorari pursuant to Rule 39(a)(1)(D), (a)(2)(A) of the Alabama Rules of Appellate Procedure.

Alabama's capital sentencing scheme also violates the requirement that any fact that increases the maximum penalty must be proved beyond a reasonable doubt. *See Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). Neither the judge nor the jury in Alabama is required to find that the aggravating circumstances outweigh the mitigating circumstances *beyond a reasonable doubt*, as required by *Apprendi*. Therefore, this Court should find that Alabama's capital sentencing scheme violates his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and Alabama law. Therefore, the Court should grant a writ of certiorari pursuant to Rule 39(a)(1)(D), (a)(2)(A).